

WORKFORCE DEVELOPMENT DEPARTMENT[871]

Adopted and Filed

Pursuant to the authority of Iowa Code section 96.11, the Director of Workforce Development hereby amends Chapter 26, "Contested Case Proceedings," Iowa Administrative Code.

These amendments update, clarify and simplify the procedures in preparing for and participating in unemployment appeal hearings.

Notice of Intended Action for these amendments was published in the June 21, 2017, Iowa Administrative Bulletin as **ARC 3137C**. No comments were received. The Notice was on the agenda for the Administrative Rules Review Committee (ARRC) meeting held on July 6, 2017. No questions or comments were received during this public meeting of the ARRC. These amendments are identical to those published under Notice.

This rule making does not have a fiscal impact on the state of Iowa.

Waiver provisions pursuant to Iowa Code section 17A.4(2) are not applicable.

After analysis and review of this rule making, no impact on jobs has been found.

These amendments are intended to implement Iowa Code chapter 96.

These amendments will become effective September 20, 2017.

The following amendments are adopted.

ITEM 1. Amend rule 871—26.9(17A,96) as follows:

871—26.9(17A,96) Discovery.

26.9(1) Discovery procedures applicable to civil actions are available to all parties in interest in contested cases.

26.9(2) Unless otherwise limited by a protective order, ~~the frequency of use of discovery methods~~ is not limited. Upon application by any adversely affected party or upon the presiding officer's own motion, the presiding officer may ~~order otherwise limit discovery~~ in the following situations:

- a. The discovery sought is unduly repetitious, or the information sought ~~may~~ can be obtained ~~in~~ by another method that is more convenient, less burdensome or less expensive; or
- b. The party seeking discovery has had prior ample opportunity to obtain the information; or
- c. The discovery is unduly burdensome or expensive when viewed in the context of the factual issues to be resolved, the limited resources of the parties, and the parties' interest in prompt resolution of the contested case.

26.9(3) A party may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the contested case, including the existence, description, nature, custody, condition and location of any tangible items and the identity and location of persons having knowledge of discoverable matters. Information may be discovered, even if inadmissible itself, if it appears reasonably calculated to lead to the discovery of admissible evidence. ~~In any event, the~~ The names of a party's witnesses, their expected testimony, and exhibits to be offered into evidence may be obtained by discovery.

26.9(4) A party who ~~has~~ responded to a request for discovery with a response which was complete and accurate when made need not supplement the response to include information obtained ~~after the response~~ later. However, a party must promptly supplement its response to requests for the identity and location of persons having knowledge of discoverable matters, and the identity of each person expected to be called to testify at the hearing, and the party must produce copies of exhibits expected to be offered into evidence at the hearing as such decisions are made. A party must also promptly amend any response if it obtains information ~~establishing~~ showing that its prior response was incorrect when made or, though correct when made, is no longer correct.

26.9(5) No motion relating to discovery, including motions for imposition of sanctions, will be considered unless the moving party ~~alleges~~ states that it ~~has~~ made a good-faith but unsuccessful effort to resolve the issues raised in the motion with the opposing party without intervention by the presiding officer.

26.9(6) Upon motion by a party or the person from whom discovery is sought or by any person who may be adversely affected thereby, and for good cause shown, the presiding officer before whom the contested case is pending may make any order which justice requires to protect a party or person from oppression or undue burden ~~of or~~ expense. Such order may deny the request for discovery or limit terms, conditions, manner and scope thereof.

26.9(7) A party may, in accordance with subrule 26.9(5), ~~apply to ask~~ the presiding officer ~~before whom a contested case is pending~~ for an order compelling discovery if the other party upon whom the request has been served fails within a reasonable time to make a complete, good-faith response. After notice to both parties and hearing ~~upon on~~ the motion, the presiding officer shall enter an order which denies or compels discovery, ~~which~~. This order may be combined with a protective order pursuant to subrule 26.9(6).

26.9(8) Upon ~~application~~ written request by any party or upon the presiding officer's own motion, the presiding officer may impose sanctions for the failure to ~~make~~ respond to discovery requests; however, sanctions shall not be imposed without prior specific notice from the presiding officer of the contemplated sanction, opportunity to be heard, and, if necessary, further opportunity to cure its failure. The sanctions may include the following:

- a. ~~The granting of a postponement to a~~ Postponing and rescheduling the hearing if requested by the party demonstrably prejudiced by the failure;
- b. ~~The exclusion of the~~ Excluding testimony of witnesses not identified in response to a specific request for such information;
- c. ~~The exclusion~~ Excluding from the record of those exhibits not identified in response to a specific request for such information;
- d. ~~The exclusion of~~ Excluding the party from ~~participation~~ participating in the contested case proceedings;
- e. ~~The dismissal of~~ Dismissing the party's appeal.

26.9(9) Requests for discovery shall be ~~filed with the Appeals Bureau, Department of Workforce Development, 1000 East Grand Avenue, Des Moines, Iowa 50319, for service on other parties and persons served on the opposing party by ordinary mail, fax or e-mail. Responses must be filed with~~ served on the party requesting the discovery within ten days after mailing by the department the discovery request is sent unless the presiding officer grants an extension of time in which to comply has been granted by the presiding officer. Requests for discovery ~~received within five~~ must be made at least ten days before a scheduled contested case hearing ~~will not be honored in the absence of a request for a postponement showing good cause therefor. A party's inattention to preparation is not good cause for postponement to postpone the hearing.~~

ITEM 2. Amend subrule 26.15(5) as follows:

26.15(5) Proposed exhibits ~~should~~ must be sent to the appeals bureau and to the other party or parties to the proceeding ~~prior to~~ before the hearing date by mail, fax, ~~or~~ e-mail or hand-delivery.

[Filed 7/26/17, effective 9/20/17]

[Published 8/16/17]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 8/16/17.